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IN THE

Supreme Court of the United States

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October Term, 1941

No. 683

JOHN C. GEIGER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

RAY L. CHESEBRO,
City Attorney,
W. JOS. MCFARLAND,
Assistant City Attorney,
JOHN L. BLAND,
Deputy City Attorney,
City Hall, Los Angeles, California,
Counsel for Respondent.

Parker & Baird Company, Law Printers, Los Angeles.

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RESPONDENT'S BRIEF.

Introduction.

This proceeding is an application for certiorari addressed to the Superior Court of the State of California, in and for the County of Los Angeles, asking this Court to review the action of such Court in the matter of the application of John C. Geiger for a writ of habeas corpus.

The petitioner in this proceeding is the same person as is the petitioner in the matter of *John C. Geiger v. The People of the State of California*, Docket No. 657, in this Court.

The case having Docket No. 657 grows out of the action of the Appellate Department of the Superior Court upon an appeal to such Appellate Department from judg-

ment of conviction in the Municipal Court of the City of Los Angeles.

The instant proceeding grows out of the action of Department 22 of the Superior Court (not the Appellate Department of such Court) upon the original petition of John C. Geiger for a writ of habeas corpus.

The proceedings are entirely separate actions involving different questions in procedure and jurisdiction, yet arise from the same set of circumstances.

The petitioner raises but two grounds in his petition: (1) that he was denied right to counsel, and (2) invalidity of the section of the Penal Code with violation of which he was charged. He mentions that the public defender did not waive jury after his appointment, but apparently does not urge that fact in opposition to the judgment of the Superior Court. The matter of waiving jury being primarily one of state concern, and because the question of compliance with the state law does not present a federal question, at least not upon the record here, we shall assume that petitioner does not claim prejudice by reason of such failure on the part of the public defender. We shall not discuss such point other than to direct attention to the opinion and order of the Superior Court in the record immediately preceding the transcript of testimony.

The Superior Court is a court of general jurisdiction (State Constitution Art. VI, Sec. 5) while the Appellate Department of the Superior Court is a statutory court, a department created by the Legislature (Stats. 1929, p. 836) by adding to the Code of Civil Procedure two new sections numbered 77a and 77b, which are set out in appendix hereto, page 17.

The Appellate Department of the Superior Court is the court of final jurisdiction for appeals from inferior courts. Appeals may be taken directly to the United States Supreme Court from its decisions. The judges who constitute the personnel of such Appellate Department are also judges of the Superior Court, and when sitting as judges of such court and not as judges of the Appellate Department they have the same jurisdiction as do other judges of the Superior Court. The judges of the Appellate Department frequently do sit as judges of the Superior Court in original proceedings instituted in such court and, while so doing, are designated as Department 22 of such court.

We shall hereafter, in our argument, point out why it is that in a habeas corpus proceeding the order of a judge of the Superior Court does not constitute a decision by the court of last resort of the state.

Statement of Fact.

The record in this case is unpaged, and for that reason we find it difficult to insert citations to line and page of the record but shall do so to the best of our ability.

The petitioner was charged in the Municipal Court of the City of Los Angeles with violation of Section 647 of the Penal Code of the State of California in a complaint filed April 15th, 1941. He was arraigned on April 15th and the case was set for trial on May 12th, 1941. On that date petitioner stated he was ready to go to trial without counsel, and waived jury trial [Rep. Tr. p. 2, lines 9-20].

Thereafter a deputy public defender was ordered to assist him [Rep. Tr. p. 2, lines 20-25].

The first paper in the record, following the petition to this Court, is a copy of the petition for writ of habeas corpus filed in the Superior Court. Such writ has at the heading thereof the following legend: "No. CR A 1806." Such number is the number of the proceeding in the Appellate Department of an appeal from judgment in the Municipal Court. Examination of the record, and in particular the return to writ (immediately following such petition) and the clerk's endorsement on such return, together with the minutes of Department 22 of the Superior Court for July 11, 1941, and July 29, 1941, discloses that the number of the habeas corpus action in the Superior Court is H. C. 11585.

In paragraph (b) of the second page of the petition for writ of habeas corpus, the petitioner alleged he was charged with "lewd and lascivious conduct." Such statement is in error. The copy of complaint in Docket No. 657, to which petitioner has made reference, shows the actual charge to be the offense of being a lewd and dissolute person. The difference lies in the fact that petitioner's statement indicates that he was charged with "doing" certain acts, while in fact he was charged with being a person of a particular character, defined by our statutes as a vagrant (Penal Code, Sec. 647).

Testimony concerning the proceedings in the Municipal Court was taken at the hearing upon the writ, and we shall refer to such testimony hereafter.

ARGUMENT.

Summary of Argument.

(1) Petitioner has not exhausted his remedy in the courts of the State of California.

(2) Defendant was not denied the right to counsel.

(3) Section 647 of the Penal Code is not unconstitutional.

I.

The Petitioner Has Not Exhausted His Remedy in the Courts of the State of California.

As shown by the record, and as more particularly pointed out in our introductory statement, the proceeding in the state court, out of which the instant proceeding grew, was a petition for a writ of habeas corpus and the hearing thereon.

Section 1474 of the Penal Code of the State of California provides that application for the writ of habeas corpus shall be made by petition. That Code provides that "the writ of Habeas Corpus may be granted in the manner provided by the Constitution" (Penal Code, Sec. 1475). The Constitution provides that the Supreme Court, and each justice thereof, has power to issue writs of habeas corpus (California Constitution, Art. VI, Sec. 4) and like power is conferred upon the District Courts of Appeal and the justices thereof (California Constitution, Art VI, Sec. 4b). The Superior Court is given power to issue such writs by the provisions of Section 5 of Article

VI of the State Constitution. It is thus seen that writs of habeas corpus may be issued out of each of the courts named as an original proceeding in such court.

Under the provisions of Section 1475, Penal Code, pertinent provisions of which are printed in appendix hereto, page 18, if a writ is denied in one court a new application therefor may be made in the court of next higher jurisdiction. The practice in this state is for petitioners to file successive writs in the Superior Court, District Court of Appeal and the Supreme Court. (*Matter of Zany*, 164 Cal. 724.)

It follows that, upon the denial by the Superior Court of his release upon habeas corpus, petitioner could have, and under the law and practice in the state should have, made application to a higher court if dissatisfied with the decision of the Superior Court.

State courts, equally with federal courts, are under obligation to guard and enforce the rights protected by the Federal Constitution, and the Supreme Court of the United States will not entertain a petition for writ of habeas corpus unless it appears that the remedies in the state courts have been exhausted. (*Mooney v. Holohan*, 294 U. S. 103.)

The petition should be denied for the reason that petitioner has not exhausted his remedies in the courts of the State of California.

II.

The Petitioner Was Not Denied the Right of Counsel.

The petitioner was charged in the complaint filed April 15th, 1941, in the Municipal Court of the City of Los Angeles, with having violated Section 647 of the Penal Code of the State of California. He had been arrested and released on bail on April 14th. The foregoing facts appear from the record in Docket No. 657, and in particular in the copy of the docket of the Municipal Court filed in the Appellate Department of the Superior Court as part of the record on appeal. A copy of such docket was omitted from the record submitted by petitioner under Docket No. 657, and is supplied by us in connection with our brief in that proceeding. On April 15th he was arraigned and his trial set for May 12th [Rep. Tr. p. 40, lines 7-11.] On May 12th defendant, in open court, stated he was ready to proceed without counsel and waived trial by jury. Thereafter a deputy public defender was appointed to assist him [Rep. Tr. p. 2, lines 15-25]. Petitioner testified that at no time had he secured private counsel [Rep. Tr. p. 40, line 17, to p. 41, line 9].

At the time of the hearing upon the petition, out of which the instant proceeding grew, testimony was taken, a certified copy of which is made a part of the record of this Court. From such testimony the trial court made the following findings of fact:

> "From the evidence produced at the hearing on the writ, the following facts, among others, are established: that petitioner appeared in court on the date set for trial, having been duly arraigned nearly a month previously. He did not have an attorney but stated he was ready for trial. In response to an inquiry from the court as to whether he desired a jury

trial or a trial by the court, defendant stated he desired a court trial. After some other matters were disposed of the defendant's case was called for trial. He came forward to the counsel table and the first witness was sworn. Then before any testimony had been given, the trial judge told Deputy City Public Defender Kristovich, who was regularly assigned to that court, to assist defendant in his case. Deputy Kristovich took his place at the counsel table and the taking of evidence then got under way. The People presented two witnesses who were cross-examined by Deputy Kristovich. Officer Brown overheard defendant say to Deputy Kristovich that the testimony of the first witness—Officer Haile—was correct, or words to that general effect. Counsel for defendant made a motion to dismiss at the close of the People's case. This was denied. Officer Brown then overheard Deputy Kristovich ask the defendant if he wanted to take the stand and he said 'No.' The two police officers and the defendant were the only witnesses to the conduct on which the charge was based. The defendant rested and the court found him guilty. Petitioner appears to be a young man of good education and to have had considerable experience, having been in the navy prior to this difficulty, and prior to that he had a clerical position with the sheriff's office of this county." [Opinion and Order, p. 1, line 10, to p. 2, line 13,]

The above findings are supported by the testimony of the petitioner that he was in the navy with rating of yeoman [Rep. Tr. p. 32, lines 13-19] and that prior to that he was a clerk in the sheriff's office in Los Angeles County [Rep. Tr. p. 34, lines 1-4]. Petitioner testified that upon the call of the case he told the court he wished

a "court trial" [Rep. Tr. p. 29, lines 2-5] and that thereafter an attorney, a deputy public defender, was appointed to act as his counsel [Rep. Tr. p. 29, lines 7-12].

The record further shows that after two witnesses for the People had testified, counsel consulted with his client [Rep. Tr. p. 3, lines 5-13]. After the People rested, the petitioner's counsel asked him if he had any witnesses he wished to call and he answered in the negative. [Rep. Tr. p. 46, lines 1-5], and his counsel asked him if he wished to testify and he stated that he did not [Rep. Tr. p. 46, lines 16-22], and the petitioner told his attorney that the testimony of the People's witness, Officer Hale, was all right or correct [Rep. Tr. p. 46, lines 6-10]. Petitioner was arraigned on April 15th and was not brought to trial until May 12th [Rep. Tr. p. 40, lines 7-12] during which time he was at liberty on bail.

Petitioner's counsel satisfied himself from examination of the officers that the only possible witnesses to the acts giving rise to the charge were the two police officers and the defendant [Rep. Tr. p. 25, lines 7-18].

The evidence in the transcript in this case and the opinion of the Superior Court support the conclusion that the petitioner, who is a young man, educated, and, in some measure at least, experienced in the matter of administration of law, knew the nature of the charge, and his right to counsel. He had ample opportunity to secure counsel of his own choosing but elected to represent himself. Certainly when the trial judge selected counsel for him he was not prejudiced thereby.

We are familiar with the ruling of this Court in the case of *Powell v. Alabama*, 287 U. S. 45, and in other cases, to the effect that under certain circumstances denial

of continuance of a trial in order to afford newly appointed counsel time to prepare a case may amount to denial of the right to counsel. We would not urge that the right to counsel is any less sacred in misdemeanor cases than in capital or felony cases, but manifestly the question in each instance is whether as the result of proceeding in the trial court the defendant has suffered injury.

The mere fact that continuance for the purpose of enabling counsel to prepare for trial was refused does not constitute denial of counsel, and if from the record it appears that defendant was ably and intelligently represented, lack of intervening time between appointment of counsel and trial will not constitute deprivation of constitutional rights. (*Avery v. State of Alabama*, 308 U. S. 444.)

The determination of whether there has been an intelligent waiver of the right to counsel must depend in each case upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused (*Johnson v. Zerbst*, 304 U. S. 458, 464) and the burden of proof (in habeas corpus) rests upon petitioner to establish that he did not competently and intelligently waive the right to counsel. (*Johnson v. Zerbst, supra*, p. 469.)

Proof of appointment of a deputy public defender to assist a defendant having the knowledge and experience possessed by the petitioner who was ready and willing to proceed to trial without counsel upon a misdemeanor, together with proof of proceeding to trial without continuing the trial to permit newly appointed counsel time in which to consult with his client or investigate the circum-

stances of the offense, falls far short of carrying the burden of proof of denial of constitutional rights. Especially is this so when the counsel appointed is a deputy public defender experienced in the trial of misdemeanor cases and who, at that time, was engaged solely in the task of defending persons charged with misdemeanor criminal offenses.

III.

Section 647 of the Penal Code of the State of California Is Not Unconstitutional.

The record in this case does not contain a copy of the complaint in the Municipal Court. A copy of such complaint, certified by the clerk of the Municipal Court, is in the record in Docket No. 657.

The defendant was charged with having violated the provisions of Section 647 of the Penal Code of the State of California, which, in so far as pertinent here, reads as follows:

> "(5) Every idle, or lewd, or dissolute person, or associate of known thieves; . . . is a vagrant and is punishable by a fine of not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

For the purpose of this argument we may disregard the words "idle" and the phrase "associate of known thieves" as petitioner was charged only with being a "lewd and dissolute person."

The requirement of certainty in statutes does not preclude the use of ordinary terms to express ideas which

find adequate interpretation in common use and understanding. (*Sproles v. Binford*, 286 U. S. 374, 393.)

We agree with petitioner that when used in a statute without specific definition, words are to be given the meaning commonly accepted by ordinary persons. The fact that during ages past they may have had a meaning entirely different from that associated with their use at the present time, does not render their meaning uncertain if at the present time they have in the public mind a fixed meaning.

Webster's Unabridged Dictionary lists four definitions of the word "lewd," three of which are shown to be obsolete. The only definition given by such dictionary not listed as obsolete is as follows:

> "Lustful, libidinous, lascivious, unchaste, lewd in speech and behavior."

The word "lewd" has been judicially defined by various courts in:

Dysart v. United States (C. C. A.), 4 Fed. (2d) 765, 766;

McKinley v. State (Okla.), 244 Pac. 208;

State v. Rose, 147 La. 243, 84 Sou. 643;

Jamison v. State, 117 Tenn. 58, 94 S. W. 675.

Without quoting at length from the cases, suffice it to say that the cases seem to be in substantial agreement that the word "lewd" when used in a statute means acts tending to suggest or arouse sexual desires; offensive to common sense of decency and modesty of the community. The word is used in the Federal Statutes and in *United States v. Bebout* (U. S. D. C., Ohio), 28 Fed. 522, the court

held that when so used means "given to unlawful indulgence of lust; eager for sexual indulgence." See also definition in *United States v. Clarke* (U. S. D. C., Mo.), 38 Fed. 732, 734.

The word "lewd" imports in the mind of the ordinary person at this time the meaning of a desire to indulge in unnatural sex acts or exhibitions, and the fact that long since it may have meant an ignorant, unlearned, lay or non-clerical person does not render it uncertain when used in a statute.

Likewise, the word "dissolute" has a well defined meaning in the public mind at the present time, and is expressed in the following definition in Webster's Unabridged Dictionary:

> "Loosed from restraint; unrestrained; lawless; esp., loose in morals and conduct, wanton; lewd; debauched."

This word, like the word "lewd" had at one time various other meanings which current dictionaries show to be now obsolete.

The word "dissolute" has also been judicially defined.

State v. Harlowe, 174 Wash. 227, 24 Pac. (2d) 601;

People v. Scott, 113 Cal. App. (Supp.) 678, 296 Pac. 601.

It may be assumed that, whatever may be the obsolete definitions found in the dictionaries, our courts will, in interpreting the statutes follow the judicial definitions,

which agree in all respects with definitions given by the dictionaries as the presently accepted meaning of the word.

It is manifest that, so long as human ingenuity evolves new and revolting ways of engaging in lustful actions it will be impossible for the Legislature to catalogue the acts which amount to lewdness.

Assuming for the sake of argument that the word "lewd" should be considered as having those meanings considered by lexicographers as obsolete, petitioner is in no better position.

If the evidence shows that the defendant performed an act within the police power to prohibit, and included within the terms of the statute, he may not complain because as to some other person who committed other acts the statute is too broad in its scope. (*Smiley v. Kansas*, 196 U. S. 447, 467.) If petitioner's complaint be that one wishing to do a certain act cannot tell in advance whether a jury or court would consider it lewd, or dissolute, we point out that a statute is not unconstitutional as being uncertain merely because a person's fate may depend upon his placing an estimate upon his actions which corresponds with that which some jury may place upon such actions at some future time.

Nash v. United States, 229 U. S. 373, 377;
Miller v. Strokl, 239 U. S. 426, 434;
Fox v. Washington, 236 U. S. 273, 277.

The statute meets the requirements of certainty prescribed by the Constitution.

Conclusion.

Because of the fact that the petitioner has not exhausted his remedies in the court of the State of California, his petition for certiorari should be denied without further consideration of the points urged by him.

If, however, it be deemed proper that some attention be given to his plea, it becomes readily apparent that both grounds urged by him are without merit and certiorari should be denied.

Respectfully submitted,

RAY L. CHESEBRO,
W. JOS. MCFARLAND,
JOHN L. BLAND,
Counsel for Respondent.

APPENDIX.

CODE OF CIVIL PROCEDURE:

"Sec. 77a. *Appellate departments of the Superior Courts: Designation of judges.* In the Superior Court of every county or city and county wherein any municipal court is established, there shall be a department thereof to be known and designated as 'Appellate department of the Superior Court,' and which shall consist of three judges of such Superior Court, who shall be designated by the chairman of the judicial council, and who, in addition to their other duties, shall serve as such for the period specified in the order of designation, and one of whom shall be designated by the chairman of the judicial council as presiding judge thereof."

CODE OF CIVIL PROCEDURE:

"Sec. 77b. *Same: Powers, duties and jurisdiction; Rules by Judicial council.* The appellate department provided by the preceding section shall have appellate jurisdiction on appeal from municipal, justices' and other inferior courts established within the county or city and county wherein such appellate department is established, in all cases in which an appeal may be taken to the Superior Court, as is now or may hereafter be provided by law, except on such appeals as require a retrial in the Superior Court. The powers of such appellate department shall be the same as are now or may hereafter be provided by law relating to appeals to the Superior Courts. The presence of two judges of such department shall be necessary to transact any business, except such as may be done at chambers, and the concurrence of two judges shall be necessary to pronounce a judgment. The pre-

siding judge of such appellate department may convene the court at any time and shall supervise the business of the department. Rules governing practice and procedure and the disposition of the business of such department shall be made by the judicial council."

PENAL CODE:

"Sec. 1475. *How granted: Proceedings thereon: Application must be verified: Prior applications: Proof of service required before hearing.* The writ of habeas corpus may be granted in the manner provided by the Constitution. If the writ has been granted by any court or a judge or justice thereof, and after the hearing thereof the prisoner has been remanded, he shall not be discharged from custody by the same or any other court of like general jurisdiction, or by a judge or justice of the same or any other court of like general jurisdiction, unless upon some grounds not existing in fact at the issuing of the prior writ. Should the prisoner desire to urge some point of law not raised in the petition for or at the hearing upon the return of the prior writ, then, in case such prior writ had been returned or returnable before a Superior Court or a judge thereof, no writ can be issued upon a second or other application except by the appropriate District Court of Appeal or some justice thereof, or by the Supreme Court or some judge thereof, and in such an event such writ must not be made returnable before any Superior Court or any judge thereof. In the event, however, that the prior writ was returned or made returnable before a District Court of Appeal or any justice thereof, no writ can be issued upon a second or other application except by the Supreme Court or some judge thereof, and such writ must be made returnable before said Supreme Court or some judge thereof. * * *"